

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 19, 2012

v

GREGORY VON PAYNE,

Defendant-Appellant.

No. 296638
Macomb Circuit Court
LC No. 2009-000925-FC

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for four counts of first-degree criminal sexual conduct (member of the same household), MCL 750.520b(1)(b), and two counts of third-degree criminal sexual conduct (force or coercion), MCL 750.520d(1)(b). We affirm.

I. FACTUAL BACKGROUND

At the time of the events in question, defendant lived with Frances Day and her three daughters. The two older daughters were twins, and they are the complainants in this case. Each complainant testified that defendant forcibly raped her on multiple occasions, beginning when she was 15 years old. They did not report the assaults for several years. Defendant admitted to having sexual intercourse with both complainants, but testified that the relationship was consensual and that the complainants were 16 at the time. In a written statement he gave during the investigation, defendant stated that “it could be possible” the complainants were 15 at the time of the incidents. At trial he testified that he only wrote that line because of pressure by the police.

II. ANALYSIS

Defendant raises many issues, some through his attorney and some through a Standard 4 brief. We will begin with those raised through defendant’s attorney.

Defendant first argues that the prosecution engaged in improper impeachment by improperly eliciting evidence of defendant’s alias, Sergio LaRoche. An unpreserved claim of prosecutorial misconduct is reviewed for plain error which affected defendant’s substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

The prosecution did not commit error by eliciting testimony regarding defendant's alias because the prosecution used the evidence to establish identity, not as a means of attacking credibility. Evidence of a defendant's use of an alias is admissible to establish identity. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). The prosecutor in this case asked the complainants and their mother to explain why they referred to defendant as Sergio during their testimony when defendant's name is Gregory, and to identify "Sergio" at trial. The prosecutor did not question the witnesses beyond this point on the topic. In addition, the defendant testified that the alias was used in his professional work as a DJ. The evidence was used solely to identify defendant, and not to attack his credibility or otherwise prejudice the defense. Admission of the evidence did not constitute error.

Defendant next argues that the prosecution improperly elicited prior bad acts testimony by questioning Day regarding defendant's alleged threat to her with a comb and the use of a pit bull to intimidate others. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). To be admissible, evidence of bad acts must be offered by the prosecutor for some purpose other than to show character or propensity, the evidence must be relevant, and the probative value of the evidence must not be substantially outweighed by unfair prejudice. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004); MRE 402; MRE 403; MRE 404(b). Day testified regarding specific acts done in the presence of the complainants or about which they had knowledge. The prosecution offered this evidence to show that there was reason for the complainants to be afraid, and thus, to explain why the complainants did not come forward for so many years. Although the evidence may have had some prejudicial impact, the probative value on an important non-character issue was substantial and that probative value was not substantially outweighed by prejudice. Certainly, admission of the evidence was within the range of principled outcomes and did not constitute an abuse of discretion.

Defendant next argues that his trial counsel was ineffective for failing to object to irrelevant and improper hearsay testimony. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *People v Riley*, 468 Mich 135, 140-141; 659 NW2d 611 (2003). To show that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms and the defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *Id.*

Defendant asserts that his trial counsel was ineffective for failing to object to Day's testimony that the complainants and other individuals told her that defendant had visited the home after she evicted him and that when defendant saw the complainants while driving he "beat on their window." We have repeatedly held that there are times at trial when it is better not to object and draw attention to an improper comment. *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). Each instance that Day referred to had already been described in the testimony of several other witnesses. Defense counsel could have validly decided that a better trial strategy would be to draw the least amount of attention to this testimony, rather than to object—even if such statements were hearsay. Defendant therefore fails to overcome the presumption of sound trial strategy.

Defendant next argues that the trial court improperly allowed the prosecution's expert, Agent O'Riordan, to testify outside of the scope of his expertise. This Court reviews preserved claims regarding admission of the evidence for an abuse of discretion. *People v Smith*, 243 Mich App 657, 670; 625 NW2d 46 (2000).

Agent O'Riordan works for the United States Secret Service, spending most of his time assisting investigations into crimes against children. He testified as to several matters. We find no error in permitting him to testify as to what defendant said during the interview. We also do not find error in his testimony based on many years of experience and training as to the reasons why victims of sexual abuse may not come forward for many years.

We do conclude, however, that it was error to allow Agent O'Riordan to offer his opinion, whether expert or lay, that the defendant was not being truthful in his statement that he believed the girls were 16 at the time he had sex with them. O'Riordan testified that in his opinion, defendant's statement was an attempt to minimize his culpability and that by stating that the complainants "might" have been 15 during the incidents the defendant was conceding that he in fact knew that they were 15. Regardless of whether O'Riordan is an expert in interviewing persons accused of criminal sexual conduct, such testimony violates the rule that an interviewer may not testify whether they believed the interviewee was being truthful. *People v Christel*, 449 Mich 578, 580; 537 NW2d 194 (1995) and *People v Dobek*, 274 Mich App 58, 97-100; 732 NW2d 546 (2007) place this limitation on the statements of a complainant and such a limitation is even more appropriate as to the defendant's statements. See also, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

We will not, however, reverse a conviction based on an evidentiary error unless there is a significant likelihood that the error was outcome determinative. *People v Crawford*, 458 Mich 376, 399; 582 NW2d 785 (1998). Improperly admitted evidence requires reversal only where the evidence was "more probably than not . . . outcome determinative." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). The evidence against defendant was overwhelming. In fact, defendant admitted to having sex with the complainants and only disputed the use of force and the age of his victims. Both complainants testified that they were 15 during the first incidents and that defendant used force against them. Further, the inappropriate testimony was brief, and O'Riordan's other testimony about the general behavioral patterns of sex offenders was admissible. The inadmissible testimony did not likely impact the jury's decision, so the error does not require reversal.

In a related argument, defendant asserts that the prosecution improperly questioned him regarding whether Day lied about knowing defendant's given name, calling defendant to comment on the credibility of another witness. Defendant is correct that a witness may not comment on the credibility of another witness, as doing so invades the domain of the jury. *Buckey*, at 17. However, the prosecutor's question, in context, shows that the prosecutor was responding to defendant's testimony on direct examination that Day lied about finding out defendant's real name in 2002. The record shows that the prosecution was not asking defendant to comment on the credibility of a witness, but instead to clarify his direct testimony. There was thus no error.

Defendant next argues that the trial court improperly admitted testimony regarding defendant's polygraph to be introduced at trial. The trial court did not commit error, as there is no evidence on the record that the jury received any information regarding a polygraph. O'Riordan testified that he performed an interview with defendant and explained that he assists the police with crimes against children, but did not mention a polygraph test in his testimony.

Defendant next argues that the prosecutor improperly argued outside of the evidence during closing argument when he argued that one of the twins was more victimized than her sister. However, the complainants' mother testified that one of the complainants was quieter than the other and that twin testified to more acts of sexual penetration than the other twin did. Defendant also argues that the prosecution shifted the burden of proof in closing arguments by stating that "[defendant] didn't provide anything" to corroborate his testimony. The prosecutor's statement is illuminated by context:

So, when you assess credibility, look at all the reasons, why would these girls seven years later on a very difficult thing come from Virginia? What do they have to burn with this guy? Absolutely nothing. He didn't even provide anything. He didn't provide a reason why these girls would come in here. Why? Because it's what happened. They want to heal and get on with their life.

A prosecutor may comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely. *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). Attacking the credibility of a theory advanced by the defendant does not shift the burden of proof. *Id.*

The prosecutor did not ask the jury to decide the case based on anything aside from the evidence; rather, the prosecutor provided an explanation for why the complainants would come forward many years later. The prosecution did not shift the burden proof; rather, the prosecution merely commented on the credibility of defendant's explanation of evidence by stating that he provided no alternate motive for the complainants to lie. This was not error.

Defendant next argues that the prosecution improperly elicited irrelevant testimony from the complainants regarding the effect that the alleged sexual assaults had on latter relationships, and used this irrelevant testimony to improperly evoke sympathy for the complainants in closing arguments. We disagree. Evidence is relevant if it has any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002); MRE 401. The prosecution's theory regarding why the complainants came forward after so many years was that since they had entered therapy, they were attempting to move on with their lives, and in doing so, needed to tell the truth about their acts with defendant. The Michigan Supreme Court has held that when the proofs are circumstantial, evidence of motive is highly relevant. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). The evidence in this case largely turned on circumstantial evidence and credibility of the complainants. To explain the necessity of therapy, the prosecution elicited testimony from the complainants regarding the effect that defendant's actions had on them. Therefore, the effect that defendant's actions had on the complainants was highly relevant.

Second, the prosecution did not use the explanation of them needing to “heal” to improperly evoke sympathy for the complainants. Defendant is correct that a prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001). The prosecutor’s comments regarding the “need to heal” were merely used to provide an explanation for the delayed reporting of the assaults, not to elicit sympathy. The prosecutor thus did not commit error in her closing argument.

Defendant next argues that the prosecution improperly elicited irrelevant testimony from Day regarding her sexual relationship with defendant. On direct examination, the prosecutor asked Day about defendant’s sexual preferences. Defendant relies on *People v Flanagan*, 129 Mich App 786, 791; 342 NW2d 609 (1983), stating that questions regarding whether a defendant’s “normal sexual desires” were satisfied prior to the assaults has been held by this Court to be irrelevant. However, the prosecutor appeared to have been asking about defendant’s preferences to show the similarities between those preferences and the complainants’ accounts of the events in 2002 which is permissible to establish a common scheme or plan. *People v Smith*, 282 Mich App 191, 193-198; 772 NW2d 428 (2009).

Defendant also contends that he was improperly asked about his sexual relationship with Day. The prosecutor, however, appeared to be responding to defendant’s testimony on direct examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. MRE 611(c). The prosecutor asked defendant questions to draw out contradictions in his own testimony. Further, as discussed above, defendant’s sexual relationship with Day was relevant. The prosecutor did not commit error.

Next, Defendant argues that the prosecution alluded to defendant’s past criminal record, asking, “And you’re fairly well familiar with the *Miranda*¹ form; Correct?” (Footnote added.) Defendant argues that the prosecutor’s question amounted to her asking defendant about prior arrests. Defendant is correct that no witness may be asked about prior arrests or charges against such witness that did not result in conviction. *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). Further, a prosecutor may not inject unfounded prejudicial innuendo into a trial. *People v Dobek*, 274 Mich App 58, 79-80; 732 NW2d 546 (2007). However, when a testimonial exchange shows that no innuendo was introduced, a defendant is not denied a fair trial. *Id.* Reading the prosecutor’s questions in context shows that the prosecutor was not seeking to inject prejudicial innuendo; rather, the prosecutor, by asking defendant about his knowledge of his *Miranda* rights, was questioning defendant on his testimony that O’Riordan forced him to include in his statement a concession that the complainants might have been 15. The record reveals that the prosecutor did not deny defendant a fair trial by asking him about his knowledge of the *Miranda* form.

In his attorney’s brief, defendant lastly argues that even if one of the errors singularly did not deny him a fair trial, the cumulative effect of the same did. Although defendant is correct that the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal and a new trial, even when any one of the errors alone would not merit reversal, absent a

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

showing of multiple errors, there can be no cumulative effect of errors meriting reversal. *People v Brown*, 279 Mich App 116; 755 NW2d 664 (2008). Defendant fails to show more than one error. The trial court therefore did not abuse its discretion in denying defendant a new trial.

The remaining issues derive from defendant's standard 4 brief on appeal. First, defendant argues that the Michigan Compiled Laws are privately owned, and therefore, he cannot be constitutionally punished under them. The criminal laws of the state of Michigan are passed by legislative process, in accordance with the Michigan Constitution. See, e.g., the legislative history of MCL 750.520b. A private company may print the books in which defendant found the statutes relevant to this case, but the statutes stem nonetheless from the legislature, and not from any private company.

Defendant next argues that the trial court lacked subject matter jurisdiction over his case. We disagree. Defendant was charged and brought to trial on six felony counts, four first-degree criminal sexual conduct counts, MCL 750.520b, and two third-degree criminal sexual conduct counts, MCL 750.520d. Circuit courts are courts of general jurisdiction and have subject matter jurisdiction over felony cases. *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011).

Defendant next argues that his trial counsel was ineffective for failing to argue that the trial court did not have subject matter jurisdiction. Counsel is not required to make meritless arguments. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). As discussed above, this argument is, in fact, meritless.

Defendant next argues that the trial court erred in failing to allow him to substitute counsel before trial. A trial court's exercise of discretion affecting a defendant's right to counsel of choice is reviewed for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003). The trial court did not abuse its discretion in denying defendant's motion for substitution of counsel.

The Sixth Amendment guarantees an accused the right to retain counsel of choice. *Akins*, 259 Mich App at 556-557. However, the right to counsel of choice is not absolute. *Id.* A determination whether the defendant's right to choose appointed counsel has been violated requires a balancing of the defendant's right to counsel of his choice against the public's interest in the prompt and efficient administration of justice. *Id.* Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *People v Bauder*, 269 Mich App 174, 193-194; 712 NW2d 506 (2005).

Defendant alleged a breakdown in communication between him and his attorney. Defendant stated that he did not believe his counsel was acting "in [his] best interest." Defense counsel responded that defendant "did not want to really listen to [defense counsel's] advice or let [defense counsel] do the cross-examinations." The trial court held that defendant's motion, "on the date of trial," with witnesses that had been flown in from out of state, on balance with the substance of defendant's disagreement with trial counsel concerning whether to call a witness—defendant's main argument—was not good cause to substitute counsel.

The trial court assured defendant that if he chose to call the witness, he could, and that being upset with defense counsel "because he's giving you the benefit of his wisdom and

experience as an attorney...[is] not a ground for having new counsel brought in this stage in the game.” The trial court made a determination based on judicial convenience and the substance of defendant’s argument that defendant did not present good cause for substitution of counsel. The trial court’s ruling was not outside of the range of principled outcomes, especially in light of the fact that key witnesses needed to travel great distances to testify.²

Affirmed.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro

² Defendant lists a number of other issues for appeal, but provides neither argumentation nor citations to support reversal of his conviction. These issues are therefore waived, and we will not address them. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).